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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF DENNIS CHAVEZ, Appellant-Petitioner, vs. VICTORIA (CHAVEZ) MASON, Appellee-Respondent.	))))))))))	No. 29A04-0603-CV-156

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0104-DR-224

August 3, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Dennis Chavez appeals a variety of rulings by the trial court in post-dissolution proceedings with his ex-wife Victoria (Chavez) Mason. We affirm in part, reverse in part, and remand.

Issues

The restated issues before us are:

I. whether the trial court erred in requiring Dennis to pay a portion of the extraordinary educational expenses for the parties's child, K.C., for private secondary education;

II. whether the trial court erred in finding Dennis to be in contempt for being in arrears on his child support obligations;

III. whether the trial court erred in determining that Dennis did not fully transfer a marital asset to Victoria, in violation of the parties' property settlement agreement;

IV. whether the trial court properly denied discovery sanctions;

V. whether the trial court erred in refusing to hold Victoria in contempt for alleged violations of the parties' joint legal custody and parenting time arrangements; and

VI. whether the trial court erred in declining to appoint a "parenting time coordinator."

Facts

Dennis and Victoria were married in 1986 and separated in 2001. Their divorce became final on September 9, 2002. They had two children during the marriage, K.C., born in 1988, and E.C., born in 1992.

The parties' property division, child support, and child custody issues were resolved by a property settlement agreement approved by the trial court. Pursuant to the agreement, Victoria was granted sole physical custody of the children and Dennis's visitation was to follow the Indiana Parenting Time Guidelines. The parties were given joint legal custody of the children. Regarding child support, the agreement stated in part:

> Dennis shall continue to pay to Vicki for the benefit and support of the parties' minor children the sum of $335.03 per week as calculated by the Court in its order dated July 11, 2001. Child Support shall be paid in two (2) installments each month of $720.31 payable by the 15th and 30th of each month. Vicki shall have the right to institute an income withholding order for child support should support become more than three (3) days delinquent. Expenses for the children such as camps, sports and other extraordinary expenses shall be divided equally between the parties with the parties discussing and agreeing on a maximum amount to be spent on camps each year by May 1st.

App. pp. 35-36. The agreement also states, "The parties will evenly divide the cost of the minor children's college education which shall be defined as tuition, room and board, books, and fees after the application of scholarships and grants." Id. at 37. Otherwise, the agreement is silent regarding educational expenses.

The provisional separation order also required Dennis to pay child support in the weekly amount of $335.03, or $720.31 payable twice monthly. He made his last payment under the provisional order on August 30, 2002, by check in the amount of $1465. He continued paying Victoria directly by check, as was permitted by the settlement agreement, twice per month through January 2004. Victoria cashed the checks and "support" was written in the memo line of each check. Beginning in February 2004,

Dennis began paying child support through the Hamilton County clerk's office through automatic withholding from his paychecks, in the amount of $670.06 every two weeks.

In 2003, K.C. applied to and was accepted as an incoming freshman student at University High School ("University"), a private school. K.C. otherwise would have attended Carmel High School. In June 2003, Victoria sent Dennis a letter stating in part:

> I am also enclosing information about University High School. [K.C.] is very excited about the education that he will receive there. It was a long difficult process for [K.C.] to be accepted and you should be proud of him for wanting to excel and show that he has what it takes to prepare for college and a successful life. Tuition is very high and I am applying for financial assistance. It is my hope that you will participate financially with his education there, encourage his work habits, his desire to do well, his hopes to obtain a scholarship and his dreams to attend the college of his choice. Please let me know how much you can contribute towards your son's education at University High School.

Ex. 21. Through December 2005, Victoria had incurred over $24,000 in tuition and fees associated with sending K.C. to University. She asked Dennis to pay one-half of these expenses, or approximately $12,000, but he refused to do so. Dennis also refused to pay one-half of other expenses that Victoria claimed were "extraordinary," including the cost of purchasing a car for K.C., school supplies for various class projects for E.C. and K.C., birthday parties for E.C. and K.C., and purchasing gifts for E.C. and K.C. to give to other children at the other children's birthday parties.

Additionally, visitation frequently did not run smoothly for the parties. Dennis asserted that Victoria sometimes interfered with his attempts to take E.C. and K.C. for weekend visitation as outlined by the Parenting Time Guidelines. Victoria denied such

interference and also claimed that Dennis often failed to take advantage of scheduled visitation when he had the opportunity to do so.

Regarding property division, the settlement agreement stated in part:

> Dennis shall transfer, by Qualified Domestic Relations Order, 100% of his Cardinal Health, Inc. Profit Sharing Retirement Plan and Gillette Company Employee Savings Plan. Dennis hereby warrants that he has not taken any loans or withdrawn any shares of stock of funds from either account since May 29, 2001 and that as of August 20, 2002, the Gillette account contained no less than 1078.99 shares of stock and the Cardinal account contained no less than 943.083 shares of stock. In the event that any loans have been taken out on these accounts or shares of stock or funds have been withdrawn since May 29, 2001, Dennis will pay to Vicki the sum of $65.92 per share of Cardinal stock and $31.88 per share of Gillette stock, plus 10% interest, for each share withdrawn, cashed in or pledged as collateral on a loan.

Id. at 38. The agreement also required Dennis to pay Victoria $5000 after the marital residence was sold.

On September 20, 2002, Victoria executed a qualified domestic relations order ("QDRO") regarding the Gillette account. Pursuant to the QDRO, 100% of Dennis's Gillette account as it existed on September 9, 2002, was distributed to Victoria in one lump sum payment of $24,465.93. This payment represented 784.768 shares of Gillette company stock at a price of $31.176 per share. These funds were distributed to Victoria in April 2003. Regarding the $5000 Dennis owed to Victoria after sale of the marital residence, Dennis claimed that he wrote several of his child support checks to Victoria in larger amounts than were required to meet his support obligation in order to pay off this $5000 debt and that he informed Victoria of this at the time.

Despite Dennis and Victoria formally having joint legal custody of K.C. and E.C., it appears miscommunications and failures to communicate regarding the children and other post-dissolution matters were endemic. On March 24, 2004, Dennis filed his first motion for rule to show cause and to enforce the dissolution decree, concerning financial matters that ultimately are not a subject of this appeal. On July 7, 2004, Dennis filed an amended motion for rule to show cause for enforcement of the decree, which included allegations that Victoria was not allowing visitation as required and requesting appointment of a parenting time coordinator to help resolve the parties' disputes in that area. Also on July 7, 2004, Victoria filed a motion for rule to show cause and petition to modify Dennis' child support obligation. The motion alleged among other things that Dennis failed to pay child support, failed to pay one-half of extraordinary expenses for the children, failed to comply with the dissolution decree with respect to distribution of the Gillette account, and failed to pay the $5000 required upon sale of the martial residence.

The trial court conducted an evidentiary hearing, but it was spread out over four days spanning eleven months: November 12, 2004, February 3, 2005, July 20, 2005, and October 19, 2005. During the course of the proceedings, Dennis filed two motions to compel Victoria to comply with discovery, both of which the trial court granted. Finally, on June 30, 2005, Dennis filed a motion seeking sanctions for Victoria's failure to comply with discovery and seeking, among other things, attorney fees because of such failure. This motion is filed stamped by the Hamilton County clerk and is reflected in the trial court's chronological case summary. Also during the course of the proceedings, the

trial court agreed to bifurcate any consideration of attorney fees until after all of the underlying issues raised by the various motions were resolved.

On December 8, 2005, the trial court entered an order that included the following:

> 3. On Husband's pleadings, the Court finds and orders:
>
> * * * * *
>
> c. The Court does not order a parenting time coordinator in this matter due to the ages of the children.
>
> * * * * *
>
> j. Husband conducted extensive discovery requests in this matter and seeks to have the Court sanction Wife for her failure to comply with discovery requests. The Court does not find that Husband ever filed a Motion for Sanctions alleging non-compliance with an Order Compelling Discovery. Furthermore, the bulk of Husband's discovery requests were done through third-party production. Thus, Husband is not harmed by any alleged non-compliance with his discovery requests. Therefore, no sanctions should be imposed.
>
> k. The Court finds the Husband has failed to exercise parenting time as he is entitled. He alleges that his parenting time has been denied while he does not exercise the parenting time to which he is entitled. The Court finds that he has unclean hands in this regard and therefore cannot hold Wife in contempt on this issue.
>
> 4. On Wife's pleadings, the Court finds and orders:
>
> a. Pursuant to the preliminary agreement dated July 11, 2001, and then pursuant to the Decree, Husband was required to pay Wife the sum of $5,000.00 upon the sale of her home. Wife alleges Husband has not paid this obligation.

b. The Court finds that Husband has failed to pay the sum of $5,000.00 and finds him in contempt for his failure to comply with the Decree in this regard.

* * * * *

d. The Court finds that Husband has failed to pay to Wife the sum of $1,916.34 on the Cardinal 401(k) retirement benefits. The Court further finds that Husband has failed to pay to Wife the sum of $9,932.27 on the Gillette 401(k) retirement account. The Court finds Husband in contempt on this issue. Wife is entitled to interest at the rate of ten percent (10%) on the same from the date of the Decree.

* * * * *

6. *Extraordinary Expenses*

a. The Decree required the parties to share the cost of camps, sports, and "other extraordinary expenses" on a 50/50 basis.

b. The Court finds that Husband shall not be responsible for expenses associated with Meridian Design Group in the sum of $50.00. The Court further finds that Wife has provided documentation, receipts and proof of extraordinary expenses to Husband, who has refused to sign certified mail for the same. The Court hereby finds that Husband is indebted to Wife in the sum of $19,043.35.

7. *Support*

a. The Decree required Husband to pay child support of $335.03 per week in two monthly installments of $720.31 each; the installment amount set forth in the Decree reflected a mathematical error and, upon correction, should have been $725.89; from September 30, 2002 through January 15, 2004, Husband made support payments of $22,685.11 directly to Wife as admitted by her in her Responses to

> Requests for Admissions. Husband has paid $670.06 every two weeks since then by wage withholding order.
>
> b. The Court does not give credit to Husband for the pre-Decree payment of August 30, 2002, of $1,465.00. Thus, Husband is in arrears in payment of child support in the sum of $1,102.13 through January 15, 2004. Thereafter, Husband paid through the Hamilton County Clerk's Office the sum of $720.31 in two monthly installments. In doing so, Husband shorted his child support obligation a total of seven weeks of support at the rate of $335.03 per week. Therefore, there is an additional arrearage of $2,345.21, with the total arrears being $3,447.34.
>
> c. The Court grants Wife's Petition to Modify and orders Husband's child support obligation increased to the sum of $368.00 weekly effective July 7, 2004. With the retroactive increase in support there is an additional arrearage to be added in the sum of $33.00 per week for sixty-eight weeks; through October 21, 2005, the resulting arrearage is an additional $2,244.00. Thus, the total arrearage is $5,691.34, and the Court finds Husband in contempt.

App. pp. 18-21.

On January 9, 2006, Dennis filed a motion to correct error. On February 17, 2006, the trial court conducted a hearing on the motion but it was not concluded, and further hearing was scheduled for May 19, 2006. On March 24, 2006, in an abundance of caution in order to avoid waiving appellate rights, Dennis filed a notice of appeal. On April 28, 2006, this court entered an order remanding to the trial court to complete hearing on the motion to correct error and to rule on the motion within forty-five days.

On June 9, 2006, the trial court entered an order on the motion to correct error. Regarding the $19,043.35 that it had ordered Dennis to pay as his one-half share of "extraordinary expenses," the trial court stated:

> The Court finds that it committed error in this regard. The Court has reviewed the multitudinous exhibits presented and now reduces the $19,043.35 previously ordered by $5,130.15. The Court finds that its inclusion of various expenses pertaining to the purchase and upkeep of [K.C.]'s car was in error as well as the inclusion of certain items that were ordinary expenses that should have been paid by Wife from the child support as paid by Husband. The $19,043.35 order is now corrected to $13,913.20.

Id. at 24. The trial court also reversed itself with respect to modifying Dennis's weekly child support obligation and finding he had failed to pay Victoria the correct amount with respect to the Cardinal retirement account. It also vacated its findings of contempt with respect to the Gillette account and nonpayment of the $5000 upon sale of the martial residence. However, it did not reverse itself with respect to its finding that Dennis had not paid the full amount on the Gillette account that he was required to and had not paid the $5000. It also did not reverse itself with respect to Dennis's alleged child support arrearage and the finding that he was in contempt for being in arrears. Finally, it did not revisit its refusal to hold Victoria in contempt for her alleged interference with Dennis's parenting time, its refusal to impose sanctions for Victoria's alleged discovery violations, and its refusal to appoint a parenting time coordinator. Dennis now perfects his appeal following the ruling on the motion to correct error.

Analysis

I. Private School Expenses

Dennis first challenges the trial court's ordering him to pay for one-half of the expenses Victoria had incurred in sending K.C. to University High School. Presumably, approximately $12,000 of the trial court's $13,913.20 judgment against him for "extraordinary expenses" represents the private school expenses.

The first question we address is whether the fact that the parties' settlement agreement required Dennis to pay one-half of the cost of "camps, sports and other extraordinary expenses" necessarily contemplated that he would pay one-half of the cost of private education for his children. The order does not specifically mention or separate out the cost of K.C.'s private education at University, but it must have been included within the award of $13,913.20 to Victoria for "extraordinary expenses." Additionally, there are no indication or findings in the trial court's order that it considered Victoria's request for private school expenses in light of Indiana Code Section 31-16-6-2(a), which governs orders for private school expenses as part of a child support order, or in light of the Indiana Child Support Guidelines with respect to private school expenses.

Dissolution courts retain jurisdiction to interpret and enforce the terms of marital property settlement agreements. Fackler v. Powell, 839 N.E.2d 165, 168 (Ind. 2005). Settlement agreements are contractual in nature and become binding upon the parties when the dissolution court merges and incorporates that agreement into the divorce decree. Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). The general rules applicable to the construction of contracts also apply to interpreting settlement

agreements. Id. Like contract interpretation, interpretation of a settlement agreement presents a question of law we essentially review de novo. Id.

"Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions." Id. Unambiguous contract terms will be given their plain and ordinary meaning. Id. The mere fact that Dennis and Victoria advocate differing interpretations of the "extraordinary expenses" provision does not necessarily render it ambiguous. See id. An ambiguity arises only if a contract provision is susceptible to more than one reasonable interpretation. Id. If a written instrument is ambiguous, we will consider all relevant evidence, including extrinsic evidence, to discern the meaning of the instrument's provisions. Id. "Ultimately, our goal is to determine the parties' intent in crafting those provisions, and to effectuate that intent." Id. at 383-84.

On its face, we cannot say Dennis and Victoria's settlement agreement unambiguously requires Dennis to pay for a private school education for his children simply because it obligates him to pay for one-half of any "extraordinary expenses." This term is combined with and compared to expenses for "camps" and "sports"; the parties are supposed to agree ahead of time to the maximum amount to be spent on "camps" at the beginning of each summer. We cannot perceive that the settlement agreement contemplated that the parties would have to agree ahead of time to camp expenses but not to private school expenses, which here have run into the tens of thousands of dollars annually. Moreover, the settlement agreement explicitly and

separately contemplates and divides the costs of college education for the children, but is silent with respect to pre-collegiate educational expenses. The inclusion of a provision requiring Dennis to pay one-half of college expenses for his children implies that he is not required to pay one-half of the cost of private school education without an express provision in the settlement agreement requiring him to do so.

To the extent the settlement agreement might be seen as ambiguous with respect to private school expenses, the limited extrinsic evidence implies that "extraordinary expenses" does not include private elementary or secondary school education. Although Victoria claims that she and Dennis had discussed the possibility of sending their children to private school while they were still married, the fact remains that both their children had always attended public school up until K.C.'s enrollment at University. Furthermore, Victoria admitted in her testimony that the parties were not contemplating sending their children to private school when they drafted the property settlement agreement.

We addressed a similar interpretation issue in Moss v. Frazier, 614 N.E.2d 969 (Ind. Ct. App. 1993). Although the parties in Moss did not have a settlement agreement, the dissolution decree stated that the father, the non-custodial parent, "shall pay one-half of all of said child's educational expenses until said child reaches 18 years of age, and he shall pay one-half for a four-year college education for said child." Id. at 970. As with Dennis and Victoria, the parties did not contemplate at the time of the divorce that the child would attend private school. Also, as in this case, the mother later sent the child to a private school and, after the child's enrollment and after substantial expenses had been incurred, the mother sought to require the father to pay one-half of those expenses.

We held in Moss that the dissolution decree did not require the father to pay for one-half of the child's education at a private school. We explained:

> Amy's reading of the decree is too expansive. Under her construction, she could send Andrew to any school, incur any expense for his education she desired, wait until after the expenses had accrued and then force John to pay his share, all without ever having the propriety of those expenses scrutinized by the trial court. We do not believe the trial court intended to give such sweeping, unfettered discretion to Amy in the original dissolution decree. Given the clear legislative policy of requiring judicial approval of extraordinary educational expenses before they are incurred and before the noncustodial parent is ordered to pay a share of those expenses, it would be unfair to read the original dissolution decree as awarding Amy the unilateral discretion to incur any educational expense for Andrew she wanted.

Id. at 972. We reach the same conclusion here. Both the language of the settlement agreement itself and the available extrinsic evidence leads us to conclude that the parties did not intend for the term "extraordinary expenses" to include costs for any private school that Victoria might unilaterally decide to send the children to. To the extent the trial court construed it differently, it erred as a matter of law.

There also is the question of whether, notwithstanding the settlement agreement, Dennis nonetheless represented to Victoria that he would help with the costs of sending K.C. to a private school. Victoria testified on direct examination that Dennis did make such a representation. However, on cross-examination, Victoria indicated that such alleged representation was based on discussions they had while they were still married, and that Dennis, after the fact of K.C.'s enrollment, told her to send the bills for University to him. Most importantly, the June 2003 letter Victoria sent to Dennis, in

which she mentioned sending K.C. to University, presented his attendance there as a fait accompli, and she stated that she "hope[d]" Dennis would help pay for it and there is no indication he had in fact agreed to do so.[1] Ex. 21.

In the absence of an express agreement by the parties to share the costs of private school, the trial court was required to enter findings indicating that it has considered the factors for a post-dissolution award of private school education expenses under Indiana Code Section 31-16-6-2. See Clark v. Madden, 725 N.E.2d 100, 106 (Ind. Ct. App. 2000). Section 31-16-6-2(a) requires consideration of the child's aptitude and ability, the child's reasonable ability to contribute to education expenses through work, loans, and other sources of financial aid reasonable available to the child and each parent, and the ability of each parent to meet the expenses. A trial court weighing a request for payment of private elementary and secondary school expenses also must consider Indiana Child Support Guideline 6 and its "Extraordinary Educational Expenses" commentary. See Sims v. Sims, 770 N.E.2d 860, 864 (Ind. Ct. App. 2002) ("in awarding any amount of extraordinary educational expenses, a trial court's 'discretion is to be exercised in a way consistent with the Guidelines.'" (quoting Carr v. Carr, 600 N.E.2d 943, 946 n. 3 (Ind. 1992))). That commentary provides:

> Extraordinary education expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or

[1] Victoria seems to contend that Dennis refused certified mail delivery of this letter. Regardless, it is clear evidence that Victoria made a unilateral decision to send K.C. to University without first obtaining Dennis's agreement to that plan or a court order directing Dennis to pay for it. We also observe that Victoria does not argue that Dennis is prevented from objecting to the cost of University under a promissory estoppel theory.

> special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.
>
> a. Elementary and Secondary Education. If the expenses are related to elementary or secondary education, the court may want to consider whether the expense is the result of a personal preference of one parent or whether both parents concur; if the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.

Ind. Child Support Guideline 6.

There are no findings by the trial court and no indication that it considered either Indiana Code Section 31-16-6-2 or the Indiana Child Support Guidelines when it ordered Dennis to pay one-half of the cost of K.C.'s attendance at University. We remand for the trial court to reconsider this award in light of the statute and guidelines, and either to reverse its order to the extent it directs Dennis to pay for private school education for K.C. or to support the order by appropriate findings. See Sims, 770 N.E.2d at 864. We note, however, that in any event, Dennis cannot be held liable for any costs incurred at University prior to Victoria's July 7, 2004 motion seeking payment of such costs, because of our conclusion that the settlement agreement did not require the payment of such costs. See Moss, 614 N.E.2d at 972. Dennis could, at the most, only be liable for costs incurred after that date. See id.

Dennis also wants this court to remand to the trial court for further proceedings to more precisely delineate what constitutes "extraordinary expenses" under the terms of the settlement agreement, which exceed Dennis's child support obligation as calculated by reference to the Indiana Child Support Guidelines. We decline to do so and wish, as

much as possible, to limit the issues to be resolved on remand. Also, Dennis does not specifically challenge the amount of "extraordinary expenses" the trial court ordered Dennis to pay that exceeds the cost of private school expenses. Furthermore, we believe it is impossible to anticipate and categorize every possible childrearing expense that might arise.

We do make the following observations in the hope of limiting future litigation between the parties. Courts should not be in the business of utilizing valuable judicial time and resources to resolve disputes concerning scores of everyday expenses associated with raising children. Child support that is calculated according to the guidelines is designed to encompass such expenses and provide a set amount of support without the need to litigate every single expense that arises. For example, the Indiana Child Support Guideline schedules "include a component for ordinary educational expenses." Child Supp. G. 6. We believe this necessarily excludes from the definition of "extraordinary expenses" such things as book rental fees, costs incurred for required school projects, and school pictures, all of which are incidental to any child's education, whether it is in public or private school. We also are of the opinion that costs associated with birthday parties and the like, whether they are parties for E.C. and K.C. or costs associated with the children attending other children's parties, should be budgeted in accordance with the regular amount of child support Dennis pays. Costs associated with optional activities, such as music, athletics, and other extracurricular activities, may fairly be considered "extraordinary expenses" because the "economic data used in developing the Child Support Guideline schedules do not include components related to those expenses of an

'optional' nature such as costs related to summer camp, soccer leagues, scouting and the like." Id.

II. Child Support

Next, we address Dennis's argument that the trial court erred in finding him to be in arrears in his child support obligation and holding him in contempt because of the alleged arrearage. Decisions regarding child support rest within the sound discretion of the trial court. Dore v. Dore, 782 N.E.2d 1015, 1018 (Ind. Ct. App. 2003). "We will reverse a trial court's decision in child support matters only for an abuse of discretion or if the trial court's determination is contrary to law." Id. "An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Poppe v. Jabaay, 804 N.E.2d 789, 793 (Ind. Ct. App. 2004), trans. denied, cert. denied.

We have reviewed the trial court exhibits regarding child support payments several times, and have been unable to square our calculations with those made either by Dennis or by the trial court (and Victoria). However, in any event, we cannot ascertain how the trial court reached the conclusion that Dennis was in arrears in his child support obligations.

The trial court found that from September 30, 2002, through January 15, 2004, i.e. during the period of time that Dennis paid Victoria directly through personal checks, Dennis paid $22,685.11 in support. It also found that this fell $1,102.13 short of the amount of support that was due during that time period. Our numbers do square with the

trial court to the extent we both conclude that approximately $23,787.00 in support was due during this time frame. However, we have reviewed the checks Dennis sent to Victoria during the period from September 15, 2002 (the first date after the dissolution decree was entered) through January 15, 2004, and find that the checks total $27,701.00. Victoria admitted that she received and cashed these checks and that they all were marked "support" or "child support" in the memo line of the checks.

The parties disagree as to why the total amount of the checks exceeds the amount of support due during that time period. Several of the checks immediately after the dissolution were for considerably more than the child support obligation. Dennis asserts that he intended to pay his $5000 debt to Victoria established by the settlement agreement in this fashion; Victoria asserts that the extra payments represented additional loans Dennis agreed to make to her. Regardless of what we are to make of the excess payments during this time period, we conclude the undisputed evidence is that Dennis fully met his child support obligation during the time from September 30, 2002 through January 15, 2004.[2]

After that time Dennis began paying child support through the clerk's office via automatic withholding of $670.06 from his paycheck that he received every two weeks, with the exception of one certified check in the amount of $670.06. Records from the Hamilton County clerk's office confirm that such withholding took place and there is no

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[2] Dennis cannot seek a credit against future support obligations based on his possible overpayment of support during this time frame. See Brown v. Brown, 849 N.E.2d 610, 615-16 (Ind. 2006). Also, although Dennis at times seems to complain about the trial court having found he still owed the $5000 debt to Victoria, he fails to develop an argument on this point and we decline to discuss it further.

evidence that it has ever been interrupted. This would represent full compliance with the child support obligation of $335.03 per week. We find no evidence in the record supporting the trial court's finding that after automatic withholding took place, Dennis "shorted his child support obligation a total of seven weeks of support" and finding "an additional arrearage of $2,345.21."[3] App. p. 21. We reverse the trial court's finding that Dennis is in arrears on his child support obligation and its judgment awarding Victoria $3,447.34 in child support arrearage, and also necessarily reverse its finding that Dennis is contempt because of a purported arrearage.

III. Gillette Retirement Account

Dennis next argues that the trial court erred in ordering him to pay Victoria $9,932.27 plus interest in connection with the liquidation and distribution of his Gillette retirement account to Victoria. This issue again requires us to interpret the parties' settlement agreement in accordance with standard contract interpretation principles. See Shorter, 851 N.E.2d at 383. We reiterate, "Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions." Id.

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[3] The trial court seems to have found, and Victoria argues, that there is in arrearage because of the mathematical error in the settlement agreement that calculated Dennis's bi-monthly support obligation, based on $335.03 per week, at $720.31 bi-monthly when the proper calculation should have been $725.89. However, once automatic withholding began Dennis paid every two weeks, not bi-monthly, so this error in the settlement agreement is irrelevant. Also, the most that such an error would cause, if Dennis had been paying bi-monthly, is approximately $200 per year, which could not support the trial court's finding of an arrearage of over $2,300 over the course of apparently two years, 2004 and 2005.

When the parties executed the settlement agreement, Dennis warranted that the Gillette account contained no less than 1078.99 shares of stock. When the Gillette account was closed and distributed in a lump sum to Victoria, however, it contained only 784.768 shares of Gillette company stock. The settlement agreement stated:

> In the event that any loans have been taken out on these accounts or shares of stock or funds have been withdrawn since May 29, 2001, Dennis will pay to Vicki the sum of $65.92 per share of Cardinal stock and $31.88 per share of Gillette stock, plus 10% interest, for each share withdrawn, cashed in or pledged as collateral on a loan.

App. p. 38. The $9,932.27 awarded to Victoria apparently was intended to represent the equivalent of the difference between 1078.99 and 784.768, multiplied by $31.88.[4]

Dennis argues that it was erroneous to award this amount to Victoria because it is undisputed that she received 100 percent of the Gillette account that still existed at the time of distribution, and that he was not responsible for any decline in the value of the fund. He also asserted during the hearing that the decrease in the number of shares in the account was caused by a loan against the account of which Victoria was aware and which was taken out on or before May 29, 2001, and that when the account was closed the shares were removed as collateral because that loan had not yet been fully repaid.

We conclude the unambiguous and plain language of the settlement agreement is that Dennis warranted that the Gillette account contained a certain number of Gillette

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[4] Again, our math does not square with the trial court's. Our calculation is that this amount is $9379.80, or (1078.99 - 784.768 = 294.222) x 31.88. Although we affirm that the trial court properly awarded Victoria an amount in connection with the Gillette account, its order should be amended to change the amount to $9379.80, with interest accruing on that amount from the date of dissolution at the rate of ten percent as agreed to in the settlement agreement.

company shares of stock. We also believe the agreement clearly provides that if there is less than that number of shares when distribution is made to Victoria, she is entitled to recompense from Dennis in an amount equal to the number of missing shares times a set value of $31.88 per share. Dennis's argument that Victoria bore the risk of gains or losses in the account is unavailing. Market fluctuations would explain increases or decreases in the value of the Gillette company stock, but not in the number of shares in the account. Under the settlement agreement, the reason why any missing shares might have been "withdrawn, cashed in or pledged as collateral" in order for Victoria to be entitled to recompense from Dennis for the missing shares is irrelevant. Id.

Dennis also argues that Victoria is precluded by the doctrine of laches from seeking recompense under the settlement agreement with respect to the Gillette account. There are three elements to laches: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. SMDfund, Inc. v. Fort Wayne-Allen County Airport Auth., 831 N.E.2d 725, 729 (Ind. 2005), cert. denied. Victoria received the Gillette distribution on or about April 23, 2003; the accompanying statement is the first evidence in the record that only 784.768 shares existed in the account, rather than 1078.99. Victoria first raised the issue regarding the Gillette account in her July 7, 2004 motion for rule to show cause. Even if we were to assume that this delay fulfilled the first two elements of laches, Dennis has not presented a cogent argument as to how or whether a change of circumstances occurred during this delay that caused prejudice to him with regard to Victoria's claim, which would be necessary to

establish laches. See id. The trial court did not err in requiring Dennis to compensate Victoria for the "missing" shares from the Gillette account in accordance with the terms of the settlement agreement. We do remand, however, for recalculation of the proper amount to be awarded, as related in footnote four.

IV. Discovery Sanctions

Dennis contends the trial court erred in refusing to sanction Victoria for her alleged noncompliance with discovery orders. During the course of the proceedings, Dennis filed two motions to compel discovery, both of which the trial court granted. On June 30, 2005, Dennis filed a motion labeled, in part, "Motion for Sanctions." App. p. 75. This motion is file-stamped and reflected in the trial court's chronological case summary. It alleged Victoria's continuing non-compliance with discovery orders and sought as sanctions for such non-compliance dismissal of her request for child support modification, limitation of evidence she could produce in support of that request, and an award of attorney fees to Dennis.

The trial court stated in its December 8, 2005 order, "The Court does not find that Husband ever filed a Motion for Sanctions alleging non-compliance with an Order Compelling Discovery." App. p. 20. This is incorrect. The trial court's records and docket clearly indicate that such a motion was filed. To the extent the trial court denied Dennis's motion for sanctions on this basis, it erred.

However, the trial court also stated, "Furthermore, the bulk of Husband's discovery requests were done through third-party production. Thus, Husband is not harmed by any alleged non-compliance with his discovery requests. Therefore, no

sanctions should be imposed." Id. We note that with respect to Dennis's requests to dismiss Victoria's petition to modify child support or to limit Victoria's introduction of evidence on that issue, the trial court ultimately declined to modify child support in its motion to correct error ruling. Thus, we limit our discussion here to Dennis's request for attorney fees as a discovery sanction. On that issue, the parties agreed that all attorney fee issues would be resolved in a separate hearing after resolution of all other issues. After the trial court ruled on the motion to correct error on June 9, 2006, Dennis filed a notice of appeal before the attorney fee issues could be resolved. Thus, there is no final ruling from the trial court before us regarding attorney fees. Upon remand after this appeal, the trial court ought to reconsider the issue of attorney fees, as part of Dennis's motion for sanctions, in light of the following discussion.

Indiana Trial Rule 37(B)(2) lists a number of sanctions a trial court may impose upon a party who has failed to comply with discovery orders, including orders compelling discovery. At this point, Dennis only is seeking attorney fees from Victoria. In that regard, Rule 37(B)(2) states:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the [discovery] order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Ind. Trial Rule 37(B)(2) (emphases added).

Subsection (B) of Rule 37 overlaps with subsection (A) of the same rule. Subsection (A) specifically governs motions to compel discovery and contains

substantially identical language with respect to an award of attorney fees if a motion to compel is granted, namely that the court "shall" require the party whose conduct forced the motion to compel "to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." We have held that pursuant to this language, if the non-moving party fails to show that noncompliance with discovery was justified or why an award of expenses would be unjust, then the trial court is required to award reasonable attorney fees to the moving party. Drake v. Newman, 557 N.E.2d 1348, 1352 (Ind. Ct. App. 1990), trans. denied. A person is "substantially justified" in resisting discovery if reasonable persons could conclude that a genuine issue existed as to whether a person was bound to comply with the requested discovery. See Munsell v. Hambright, 776 N.E.2d 1272, 1277 (Ind. Ct. App. 2002), trans. denied.

On remand, in accordance with the plain language of Rule 37(B), if Dennis establishes that Victoria failed to comply with discovery orders, then she must pay reasonable attorney fees and expenses incurred by Dennis because of such failure, unless she can show substantial justification for failing to comply or that an award of expenses would be unjust. It does not appear to us that the fact Dennis was able to acquire needed documents through third-party discovery is sufficient, by itself, to absolve Victoria of responsibility for failing to comply with discovery orders. If Victoria lacked a legitimate reason to object to the discovery requests from Dennis, and Dennis therefore had to incur additional expenses and attorney fees in order to obtain needed documents through third-

party discovery, that seems to us precisely the type of cost that Trial Rule 37(B)(2) addresses. See, e.g., Best v. Best, 470 N.E.2d 84, 88 (Ind. Ct. App. 1984) (holding husband was entitled to attorney fees under Rule 37(B) when wife did not comply with discovery orders and husband was forced to obtain information by alternative means). We remand for further consideration of this issue.

V. Contempt

We next address Dennis's argument that the trial court should have held Victoria in contempt for allegedly interfering with his parenting time with the children and for failing to abide by the settlement agreement's joint legal custody arrangement. The determination of whether a party is in contempt of court is a matter within the trial court's discretion. Van Wieren v. Van Wieren, 858 N.E.2d 216, 222-23 (Ind. Ct. App. 2006). We will reverse a finding or non-finding of contempt only where an abuse of discretion has been established. Id. at 223. "When reviewing a contempt order, we will neither reweigh the evidence nor judge the credibility of witnesses." Id. Even if a party commits acts that could support a contempt finding, "we will not require the trial court to find a party to be in contempt where . . . the court has found that those actions fall short of necessitating contempt sanctions." Id.

Here, the question of whether and to what extent Victoria interfered with Dennis's parenting time is extremely fact-sensitive. Also, after the parties' dissolution, they did not adhere strictly to the Indiana Parenting Time Guidelines and were more informal about visitation, but that as time went on and the parties' relationship became more strained, Dennis became more insistent on strict adherence to the Guidelines.

Furthermore, there is evidence Dennis did not always take advantage of parenting time opportunities that were available to him. Given all of these factors, we believe the trial court clearly was in the best position to determine whether it was necessary to hold Victoria in contempt for any alleged interference with Dennis's parenting time. See id.

Much the same considerations apply with respect to Dennis's claim that Victoria violated the parties' joint legal custody arrangement. There is ample evidence in the record that the parties have severe communications problems, which now has manifested itself in protracted litigation regarding multiple issues, down to whether Dennis should be required to pay for one-half of a newspaper that Victoria purchased several years ago. During their testimony, each party tended to blame the other for this breakdown in communication. Faced with such conflicting versions of events, it was well within the trial court's prerogative not to hold Victoria in contempt for allegedly violating the joint legal custody arrangement. We cannot say the trial court abused its discretion in declining to hold Victoria in contempt.

VI. Parenting Time Coordinator

Finally, Dennis asserts the trial court erred in refusing to appoint a "parenting time coordinator" to resolve conflicts between him and Victoria regarding parenting time and visitation issues. Dennis directs us to no statute, rule, guideline, or judicial precedent that would authorize the trial court to appoint a "parenting time coordinator" to micromanage the parties' parenting time disputes. Our independent research has revealed that no such authority exists. As such, there is no basis upon which we could say the trial court erred in refusing to appoint a "parenting time coordinator."

We note that the Indiana Parenting Time Guidelines set forth a procedure to be followed whenever conflicts arise regarding parenting time, which provides in part as follows:

> **1. Disagreements Generally.** When a disagreement occurs regarding parenting time and the requirements of these Guidelines, both parents shall make every effort to discuss options, including mediation, in an attempt to resolve the dispute before going to court.
>
> **2. Mediation.** If court action is initiated, the parents shall enter into mediation unless otherwise ordered by the court.
>
> **3. Child Hesitation.** If a child is reluctant to participate in parenting time, each parent shall be responsible to ensure the child complies with the scheduled parenting time. In no event shall a child be allowed to make the decision on whether scheduled parenting time takes place.
>
> *** * * * ***
>
> **5. Withholding Support or Parenting Time.** Neither parenting time nor child support shall be withheld because of either parent's failure to comply with a court order. Only the court may enter sanctions for noncompliance. A child has the right both to support and parenting time, neither of which is dependent upon the other. If there is a violation of either requirement, the remedy is to apply to the court for appropriate sanctions.
>
> **6. Enforcement of Parenting Time.**
>
> A. Contempt Sanctions. Court orders regarding parenting time must be followed by both parents. Unjustified violations of any of the provisions contained in the order may subject the offender to contempt sanctions. These sanctions may include fine, imprisonment, and/or community service.
>
> B. Injunctive Relief. Under Indiana law, a noncustodial parent who regularly pays support and is barred from

> parenting time by the custodial parent may file an application for an injunction to enforce parenting time under Ind. Code § 31-17-4-4.
>
> C. Criminal Penalties. Interference with custody or visitation rights may be a crime. Ind. Code § 35-42-3-4.
>
> D. Attorney Fees. In any court action to enforce an order granting or denying parenting time, a court may award reasonable attorney fees and expenses of litigation. A court may consider whether the parent seeking attorney fees substantially prevailed and whether the parent violating the order did so knowingly or intentionally. A court can also award attorney fees and expenses against a parent who pursues a frivolous or vexatious court action.

Ind. Parenting Time Guideline I(E).

Thus, under this guideline, the first step when parenting time conflicts arise is for the parties to attempt to work out the problem themselves. If that fails, then the court may order the parties to mediation. Additionally, a child's reluctance to visit with a non-custodial parent should not be given effect. Disagreements between the parties as to other issues cannot be used as a reason to withhold parenting time. Finally, if all else fails, court action may be taken to force compliance with parenting time requirements. Of course, as we have noted, a trial court has broad discretion in weighing evidence and deciding whether contempt or other sanctions are warranted in a particular case. Hopefully, upon remand Dennis and Victoria will be able to adhere to a parenting time schedule without future court intervention.

Conclusion

The trial court erred in ordering Dennis to pay for one-half of K.C.'s private school education without making the necessary findings that would support such an

order. We remand for further consideration of that issue. We also remand for further consideration of Dennis's motion for attorney fees as sanctions for Victoria's alleged violations of discovery orders. We reverse outright the finding that Dennis was in arrears in his child support obligation and the accompanying contempt finding. We affirm outright the judgment in favor of Victoria with respect to the Gillette retirement account, subject to a slight recalculation of the amount owed. We also affirm outright the trial court's refusal to hold Victoria in contempt and to appoint a "parenting time coordinator" for the parties.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., concurs.

RILEY, J., concurs in result.